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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/765,423	01/27/2004	Brian David Hofrichter	9150	1531

27752 7590 08/18/2006

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EXAMINER

DOUYON, LORNA M

ART UNIT PAPER NUMBER

1751

DATE MAILED: 08/18/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/765,423	HOFRICHTER ET AL.	
	Examiner	Art Unit	
	Lorna M. Douyon	1751	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 12 June 2006.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1 and 3-20 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1, 3-20 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

1. This action is responsive to the amendment filed on June 12, 2006.
2. Claims 1, 3-20 are pending. Claim 2 was cancelled.
3. The rejection of claim 20 under 35 U.S.C. 112, second paragraph is withdrawn in view of Applicants' amendment. The amended claim, however, should have properly presented the claim with "underlining" for the added limitation.
4. The rejection of claims 1, 9, 11-14, 17-20 under 35 U.S.C. 102(b) as being anticipated by Nakamura et al. (US Patent No. 5,853,711), hereinafter "Nakamura" is withdrawn in view of Applicants' amendment.
5. Claims 1, 3-20 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Fowler et al. (US Patent No. 5,534,265), hereinafter "Fowler" for the reasons set forth in the previous office action.

Response to Arguments

6. Applicants' arguments filed June 12, 2006 have been fully considered but they are not persuasive.

With respect to the rejection based upon Fowler, Applicants argue that the compositions of Applicants' claimed invention are capable of containing and effectively depositing and retaining solid particle benefit agents on the treated surface to deliver improved hair volume,

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body, and fullness while simultaneously delivering improved wet conditioning and combing performance. While many various shapes may be appropriate for the cleansing compositions of Fowler, Applicants have made the surprising discovery that using spherical and irregular particles, wherein the median particle size of said spherical particle is greater than the median particle size of said irregularly shaped particle, volume, body, fullness with improved wet conditioning and combing performance may be achieved, and this combination is not taught or suggested by Fowler, nor does Fowler address the problems of achieving improved volume body, fullness or delivering improved wet conditioning and combing performance.

The Examiner respectfully disagrees with the above arguments because in col. 1, lines 7-9, Folwer teaches that the personal care composition which comprises the micronized cleansing particles is useful for cleansing the skin and hair. Even though Fowler does not explicitly disclose the composition as to its usefulness in improving hair volume, body, and fullness while simultaneously delivering improved wet conditioning and combing performance, it would have been obvious to one of ordinary skill in the art at the time the invention was made to reasonably expect the composition of Fowler to exhibit similar properties because similar ingredients have been utilized. In col. 4, lines 15-57, Fowler teaches particles having a wide range of shape, surface characteristics, and hardness characteristics, provided the particle size requirements are met (i.e., from about 1 micron to about 75 microns), for example, polyethylene, nylon and silica, etc. and mixtures thereof. With respect to the proportions of the irregular and spherical shapes of the particles, it would have been obvious to one of ordinary skill in the art at the time the invention was made to optimize said proportions through routine experimentation for best results. As to optimization results, a patent will not be granted based upon the optimization of

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result effective variables when the optimization is obtained through routine experimentation unless there is a showing of unexpected results which properly rebuts the *prima facie* case of obviousness. See *In re Boesch*, 617 F.2d 272, 276, 205 USPQ 215, 219 (CCPA 1980). See also *In re Woodruff*, 919 F.2d 1575, 1578, 16 USPQ2d 1934, 1936-37 (Fed. Cir. 1990), and *In re Aller*, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955). Applicants argue that a surprising discovery was made using spherical and irregular particles wherein the median particle size of said spherical particle is greater than the median particle size of said irregularly shaped particle, however, Applicants have not provided any showing of criticality of said parameters when compared to prior art which teaches particles having a wide range of shapes as in Fowler. Accordingly, the rejection based upon Fowler is maintained.

7. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

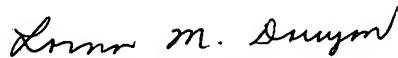
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8. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lorna M. Douyon whose telephone number is (571) 272-1313.

The examiner can normally be reached on Mondays-Fridays from 8:00AM to 4:30 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Douglas McGinty can be reached on (571) 272-1029. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


Lorna M. Douyon
Primary Examiner
Art Unit 1751